JURISDICTION

The judgment of the Court below (App. p. 79) was entered on December 10, 1971. Notice of appeal was filed in the Court of Appeals for the Sixth Circuit on February 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A., §1259(1).

QUESTIONS PRESENTED FOR REVIEW

The sole issue presented by this appeal is whether the recent United States Supreme Court decision, *Waller v. Florida*, 397 U.S. 387 (1970), declaring an end to the "dual sovereignty" theory with respect to criminal prosecutions by the states, should be accorded retroactive application.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution.

2. The Fourteenth Amendment, United States Constitution.

Amendment 5:

Criminal actions—Provisions concerning—Due process of law and just compensation clauses—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

Amendment 14:

Citizenship—Due process of law—Equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

The petitioner was tried and convicted of assault and battery for violation of an ordinance in the City Court of Chattanooga in three cases and was fined $50.00 and costs on each offense. Thereafter, the petitioner was indicted by the Grand Jury of Hamilton County, Tennessee, in September, 1962, in three cases charging the offense of assault with intent to commit first degree murder. The occurrence giving rise to these three indictments were the same as those giving rise to the three city charges. The petitioner pleaded guilty to all three cases in the Criminal Court of Hamilton County, Tennessee, and received two sentences of three to ten years and one sentence of three to five years, with the sentences to run consecutively. The petitioner is presently in custody of respondent Warden, Tennessee State Penitentiary, pursuant to the sentences imposed in the Criminal Court of Hamilton County, Tennessee. In July, 1966, the peti-

tioner filed a petition for writ of habeas corpus in the Criminal Court of Davidson County, Tennessee, contending double jeopardy in the Criminal Court of Hamilton County due to the fact he had been convicted of assault and battery in the City Court of Chattanooga and was fined in three cases arising out of the same facts and circumstances. This petition for writ of habeas corpus was denied in the Criminal Court of Davidson County. An appeal of this ruling was perfected to the Tennessee Supreme Court and the denial of the writ was affirmed. Thereafter, the petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee, Nashville Division, contending he was placed twice in jeopardy for the same offenses and the convictions and sentences imposed in the Criminal Court of Hamilton County, Tennessee, were invalid and unconstitutional. The case was transferred to the United States District Court for the Eastern District of Tennessee, Southern Division. After due consideration, the Honorable Frank W. Wilson Judge, United States District Court for the Eastern District of Tennessee, Southern Division, entered a final order on June 23, 1967, dismissing the petition for habeas corpus. The petitioner herein appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court's denial of the writ order dated April 10, 1968. Thereafter, in April, 1970, the petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee, Southern Division, raising again the double jeopardy matter, contending he was twice placed in jeopardy for the same offense and that the sentences resulting from the second trial were invalid. The petitioner in this petition relied upon the April 6, 1970, Supreme Court case of *Waller v.*

Florida, 397 U.S. 387 (1970) (App. p. 1). After due consideration, the Honorable Frank W. Wilson, Judge, United States District Court for the Eastern District of Tennessee, Southern Division, sustained the petition for writ of habeas corpus (App. p. 75). Thereafter, respondent appealed that decision to the United States Court of Appeals for the Sixth Circuit, who reversed the decision of the District Court on December 10, 1971 (App. p. 79). On February 24, 1972, Notice of Appeal was filed in the United States Court of Appeals for the Sixth Circuit.

ARGUMENT AND AUTHORITIES

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT WAS IN ERROR IN REVERSING THE DISTRICT COURT'S HOLDING THAT *WALLER V. FLORIDA* SHOULD BE ACCORDED RETROACTIVE APPLICATION. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

In *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed. 2d 435 (1970), the Supreme Court considered the narrow issue of whether a person can be put to trial for the same crime in two different courts within the same state. The Defendant, Waller, along with several others, removed a mural from a wall inside the City Hall of St. Petersburg, Florida. After removing the mural, they carried it through the streets where they were confronted by police officers. After a scuffle with the officers, the mural was recovered but in a damaged condition. Waller was charged by the city with violating two city ordinances, destruction of city property and breach of the peace, and after conviction on both charges in the

municipal court, was sentenced to 180 days. The State of Florida then filed a felony information charging Waller with grand larceny. Prior to trial, Waller petitioned the Supreme Court of Florida for a writ of prohibition asserting the double jeopardy clause barred the state prosecution, but relief was denied. Waller was again found guilty and received a sentence of six months to five years less 170 days of the 180 day sentence previously imposed. It was undisputed the city and state charges both grew out of the same occurrence or conduct. The Fifth Amendment's prohibition against double jeopardy was applied to the states in *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 707 (1969). The Court, in Waller, dismissed the "dual sovereignty" theory between city and state as an anachronism, finding the second trial by the State of Florida constituted double jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution, and the Court specifically held as follows:

> "We decide only that the Florida courts were in error to the extent of holding that–
>
> > '. . . even if a person had been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.' "

The Court rejected Florida's contention that the "dual sovereignty" theory outlined in *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959), which permits successive prosecutions by federal and state governments for the same offence, controlled in this case, the Court further stated:

> "[T]he judicial power to try petitioner on the first charges in municipal court springs from the same

organic law which created the state court of general jurisdiction in which petitioner was tried and convicted for a felony. Accordingly, the apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States. The legal consequence of that relationship was settled in *Grafton v. United States*, 206 U.S. 333 (1907), where this Court held that a prosecution by a court of the United States is a bar to a subsequent prosecution by a territorial court, since both are arms of the same sovereign."

After a review of *Waller*, Judge Wilson, in his Memorandum Opinion (App. p. 67), draws the issue as follows:

"The relevant factual situation in the instant case and in *Waller* are substantially identical. The only legal problem presented is whether the holding in *Waller* should be applied retroactively. The petitioner contends that it should and in support of his legal position relies upon certain footnotes in *Waller v. Florida, supra*, and in *Ashe v. Swenson*, ___ U.S. ___, ___ L. Ed. 2d ___ (1970). The respondent on the other hand relies upon the criteria outlined in *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199, and *Desist v. United States*, ___ U.S. ___, ___ S. Ct. ___, 22 L. Ed. 2d 248 (1969), and contends that in accordance with these criteria the decision in *Waller* should be applied prospectively only."

On the issue herein involved as to whether *Waller* should be applied retroactively or prospectively, the respondent has in the lower courts dwelled at length on the reliance upon the dual sovereignty theory between the municipalities and the State of Tennessee. Therefore, it would seem appropriate at this point to examine this contention.

The municipality of the City of Chattanooga is a subdivision of the State of Tennessee and not a separate sovereign. Therefore, prosecution by the City of Chattanooga should be regarded as prosecution by the state, for purposes of applying the double jeopardy provision.

A municipality, in this instance the City of Chattanooga, is not a "sovereign"; it is a mere subdivision of the state. Article 11, Section 8, of the Tennessee Constitution gives power to the State Legislature (General Assembly):

> "[To] Provide by general laws for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfer with or divest rights which have become vested."

Municipal corporations in Tennessee may be created by the Legislature by special acts under and since the Constitution of 1870. *Luehrman v. Shelby County Taxing District* (1879), 70 Tenn. 425. Municipal corporations may be created by special laws, and their charters may be amended or repealed by special laws. *Luehrman v. Shelby County Taxing District, supra.*

The Supreme Court of the State of Tennessee held in *State ex rel. v. Wilson* (1883), 80 Tenn. 247, that the Legislature has the power to create municipal corporations independently of any constitutional grant.

It is within the legislative power to create a municipal corporation. *Bradley v. Rock Gardens Utility District* (1948), 186 Tenn. 665, 212 S.W.2d 657.

The City of Chattanooga is a municipal corporation granted a charter from the Tennessee State General Assembly by private act and throughout the years the charter has been amended, altered and expanded by

subsequent private acts. *The Code of the City of Chattanooga, Tennessee* (1960), Michie City Publications Company, Charlottesville, Virginia, 1961. The City Court of Chattanooga, Tennessee, was likewise established by private act from the Tennessee State Legislature.

A municipal corporation is a subordinate branch of the domestic government of a state. *Mayor and Recorder of City of Nashville v. Ray* (1873), 86 U.S. 468.

"Municipalities" are arms of state, governmental agencies on which state may confer governmental functions, to such extent and with such restrictions as may seem to legislature demanded by their corporate needs. *Nashville, C. & St. Louis Railway v. Marshall County* (1930), 161 Tenn. 236, 30 S.W.2d 268. Municipalities are creatures of legislature. *State ex rel. Town of Arlington v. Shelby County Election Commission* (1961), 209 Tenn. 289, 352 S.W.2d 809. The legislature has authority to create municipal corporations and vest them with such authority as does not violate federal or state constitutions. *Holly v. City of Elizabethton* (1951), 193 Tenn. 46, 241 S.W.2d 1001.

Under Tennessee law, the state has absolute control and complete sovereignty over municipalities. *City of Knoxville, Tennessee v. Bailey* (1955), 222 F.2d 520. Municipal corporations are arms of the state, to which has been delegated for purposes of local government a portion of the state's sovereign power. *Bricker v. Sims* (1953), 195 Tenn. 361, 259 S.W.2d 661. Municipal governments are instrumentalities of the state for purposes of local government, and the legislature has absolute control within constitutional limits of the creation, modification and abolition of municipal governments. *City of Elizabethton v. Carter County* (1958), 204 Tenn. 452, 321 S.W.2d 822.

A "municipal corporation" is a political or governmental agency of the state, which has been constituted for the local government of the territorial division described and which exercised, by delegation, a portion of sovereign power for the public good. Legislature has complete and unrestricted control of municipal corporations in state. *Thornton v. Carrier* (1957), 43 Tenn. App. 615, 311 S.W.2d 208.

From the above authorities it is clear that a municipality of the State of Tennessee is a creature of the state and the municipal courts exercise a portion of the judicial power of the state as conferred upon them by the State Legislature. The point was expressed in the context of Legislative Reapportionment in the following language:

> Political subdivisions of states—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . . The relationship of the states to the federal government could hardly be less analogous.

Reynolds v. Sims, 377 U.S. 533, at 575 (1964), 84 S. Ct. 1362, at 1388; *Waller v. Florida, supra.*

Therefore, it appears abundantly clear the municipalities of Tennessee are not, and have not been recognized as "sovereigns" and the assertion of reliance on "dual sovereignty" as asserted by the respondent is without basis.

Any discussion of the legal question of the retroactive application of a decision must begin with the 1965 decision of *Linkletter v. Walker,* 381 U.S. 618, 85 S. Ct. 1731. That landmark decision established that in resolv-

ing a retroactivity issue the Court must consider three criteria:

(1) the purpose of the new rule;

(2) the reliance on the old rule by law enforcement officials;

(3) the effect on the administration of justice of a retroactive application of the new rule.

Since 1965, the Supreme Court has been confronted with the retroactive application of a new standard on several occasions. It has held the new standards to be retroactive in the following cases: *Loper v. Beto*, 92 S. Ct. 1014, construing *Gideon v. Wainwright*, 83 S. Ct. 792, 372 U.S. 335 (right to counsel at trial); *Roberts v. Russell*, 88 S. Ct. 1921, 392 U.S. 293 (admission of a co-defendant's confession implicating defendant at a joint trial wherein a co-defendant does not take stand denies defendant right of confrontation); *McConnell v. Rhay*, 89 S. Ct. 32, 393 U.S. 4 (revocations of probation and impositions of sentences in proceedings at which defendants were not represented by counsel or advised of right to have counsel appointed were invalid); *Arsenault v. Massachusetts*, 89 S. Ct. 35, 393 U.S. 6 (guilty plea without counsel at preliminary hearing introduced at trial); *Berger v. California*, 89 S. Ct. 540, 393 U.S. 314 (testimony of missing witness who testified at preliminary hearing violated right of confrontation); *United States v. United States Coin and Currency*, 91 S. Ct. 1041 (gamblers had Fifth Amendment right to remain silent despite statutory requirement that they submit reports which could incriminate them in forfeiture proceeding); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (right to counsel on appeal); *Eskridge v. Washington Prison Board*, 357 U.S. 214 (right to transcript on appeal); *Ashe*

v. Swenson, 397 U.S. 436, 90 S. Ct. 1189; *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (application of the Double Jeopardy Clause of the Fifth Amendment to the States); *Witherspoon v. Illinois*, 391 U.S. 510 (death penalty).

Likewise, the Supreme Court has held decisions to have prospective rather than retrospective application in several cases: *Linkletter v. Walker*, 85 S. Ct. 1731, 381 U.S. 618 (rule of *Mapp v. Ohio* that exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment is required of the states by the due process clause of the Fourteenth Amendment); *Tehan v. United States*, 86 S. Ct. 459, 382 U.S. 406 (adverse comment by a prosecutor or trial judge upon a defendant's failure to testify in a state criminal trial violates the federal privilege against compulsory self-incrimination); *Johnson v. State of New Jersey*, 86 S. Ct. 1772, 384 U.S. 719 (Escobedo decision which renders inadmissible statements elicited by police during an in-custody interrogation if accused's request to consult with his lawyer has been denied and he has not been effectively warned of his absolute constitutional right to remain silent and the Miranda decision relating to right of a suspect to have an attorney present at in-custody interrogation); *Stovall v. Denno*, 87 S. Ct. 1967, 388 U.S. 293 (rules requiring exclusion of identification evidence which is tainted by exhibiting accused for identifying witnesses before trial in absence of his counsel); *DeStefano v. Woods*, 88 S. Ct. 2093, 392 U.S. 631 (right to jury trial); *Fuller v. Alaska*, 393 U.S. 80, 89 S. Ct. 61 (construing *Katz v. United States*, which held that evidence obtained in violation of Federal Communications Act proscribing unauthorized interception and divergence of communications is not admissible in state

court trials); *Desist v. United States*, 89 S. Ct. 1030, 394 U.S. 244 (decision overruling cases holding that search and seizure of speech requires some trespass or actual penetration of a particular enclosure); *Jenkins v. Delaware*, 89 S. Ct. 1677, 395 U.S. 213 (Miranda case standards relating to rights of accused to remain silent and to assistance of counsel did not apply to retrial of defendant whose first trial commenced prior to date of Miranda decision); *Hill v. California*, 91 S. Ct. 1106, *Williams v. United States*, 91 S. Ct. 1148, *Elkanich v. United States*, 91 S. Ct. 1148 (search permissible in scope under pre-Chimel standards would not be retrospectively invalidated); *Mackey v. United States*, 91 S. Ct. 1160 (Marchetti and Gross doctrines not applied retroactively to overturn earlier income tax evasion conviction based on then applicable constitutional principles); *Adams v. Illinois*, 92 S. Ct. 916 (preliminary hearing is critical stage of criminal proceeding, required presence of counsel).

In *Williams v. United States, supra*, Mr. Justice White stated the following:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.
>
> It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results

but to serve other ends. In these situations the new doctrine raises no question about the guilt of defendants convicted in prior trials.

In embarking upon this analysis of retrospective versus prospective effect of an overruling decision certain general principles have been clearly defined by the Supreme Court. The latest detailed pronouncement of these principles is to be found in *Desist v. United States*, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969), wherein Justice Stewart observed:

> Ever since *Linkletter v. Walker*, 381 U.S. 618, 629, 14 L. Ed. 2d 601, 608, 85 S. Ct. 1731, established that "the Constitution neither prohibits nor requires retrospective effect" for decisions expounding new constitutional rules affecting criminal trials, the Court has viewed the retroactivity or nonretroactivity of such decisions as a function of three considerations. As we most recently summarized them in *Stovall v. Denno*, 388 U.S. 293, 297, 18 L. Ed. 2d 1199, 1203, 87 S. Ct. 1967, "the criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Accordingly, "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." See *Linkletter v. Walker, supra.*

Applying the criteria outlined in the *Linkletter Case* to the instant case, the Court must look to the history and purpose of the *Waller* rule; any reliance placed by the States upon the rule of law as it existed prior to *Waller;* and the effect on the administration of justice of a retrospective application of *Waller.*

I.

THE PURPOSE TO BE SERVED BY THE NEW RULE.

In this regard the Court in *Desist v. United States, supra,* further outlines the relative importance of each criteria in weighing the relative merits of retroactivity.

> Foremost among these factors is the purpose to be served by the new constitutional rule . . . . It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity.

The first appropriate inquiry to be undertaken is an examination of the history and purpose of the *Waller* rule. In this regard, the specific holding of *Waller v. Florida, supra,* is as follows:

> We decide only that the Florida courts were in error to the extent of holding that–
>
> > ". . . even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court."

The decision in the *Waller Case,* holding that a municipal court conviction and a state court conviction of the same offense constitutes double jeopardy and is in violation of the Fifth and Fourteenth Amendments, is in turn based upon the prior decision of the Supreme Court in the case of *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), wherein the Court overruled *Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, and held that the Fifth Amendment prohibition against double jeopardy was made applicable to the states through the Fourteenth Amendment.

In *Benton v. Maryland, supra,* the Court held the double jeopardy provisions of the Fifth Amendment of the United States Constitution applicable to the states through the Fourteenth Amendment. This case involved a second prosecution by the State of Maryland for larceny after the defendant, Benton, had been acquitted on a first trial. In the first trial the defendant was convicted of burglary and acquitted of larceny. He appealed and the case was remanded to the trial court by the Appellate Court of Maryland for re-indictment and a new trial. On the retrial the defendant was convicted of both burglary and larceny. The defendant appealed and his conviction in the second trial for larceny was affirmed. On appeal to the Supreme Court of the United States, Justice Marshall delivering the opinion of the Court held that the Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment.

In *Benton v. Maryland, supra,* the Court stated:

> . . . [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.

In examining the purpose of the *Waller Case* it is well to note the rationale, history and purpose of *Benton v. Maryland* as outlined by Justice Marshall:

> The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. See *Bartkus v. Illinois,* 359 U.S. 121, 151-155, 3 L. Ed. 2d 684,

705-707, 79 S. Ct. 676 (1959, Black, J., dissenting). As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of autrefoits acquit, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green v. United States*, 355 U.S. 184, 187-188, 2 L. Ed. 2d 199, 204, 78 S. Ct. 221, 61 A.L.R. 2d 1119 (1957), "[T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice." The validity of petitioner's larceny conviction must be judged not by the watered-down standard enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provision.

Waller v. Florida is simply an expansion of the newly announced principles in *Benton v. Maryland*. In abrogating the "dual sovereignty" theory with regard to municipal and state charges based upon the identical offense,

the Court relied upon the holding in *Benton* for the proposition that the Fifth Amendment prohibition against double jeopardy applied to the states. While recognizing that successive prosecutions by state and federal governments had been held to be non-violative of the Double Jeopardy Clause since dual sovereignties are involved [see *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213 (1847); *Bartkus v. Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1969); *Abbate v. United States*, 359 U.S. 187, 3 L. Ed. 2d 729, 79 S. Ct. 666 (1969)], the Court held these cases inapplicable in a situation where the successive prosecutions were by municipal and state governments, both arms of the same sovereignty. Rather, in *Waller* the Court followed the rule previously established in the case of *Grafton v. United States*, 206 U.S. 333, 51 L. Ed. 1084, 27 S. Ct. 749 (1907), wherein it had been held that "a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court (Philippine Islands), since both are arms of the same sovereignty."

Having pointed out the reliance placed in *Waller* upon the prior decisions of *Benton v. Maryland, supra*, and *Grafton v. United States, supra*, two observations are appropriate.

One observation is that the retroactivity of the *Benton* decision has been decided and that case has been held to be "fully retroactive."

In a concurring opinion, in *Waller v. Florida, supra*, Justice Brennan, at page 1189, in an asterisk footnote, states:

> * I adhere to the Court's holding in Ashe v. Swenson, 396 U.S., at ___, 90 S. Ct. at 1189, 24 L. Ed. 2d at ___, n. 1, that our decision in Benton v.

Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States, is "fully 'retroactive'." See also North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2089, 23 L. Ed. 2d 656 (1969).

In *Ashe v. Swenson*, 90 S. Ct. 1189 (April 6, 1970), Justice Stewart, delivering the opinion of the Court, states in Footnote 1, at page 1191:

> 1. There can be no doubt of the "retroactivity" of the Court's decision in Benton v. Maryland. In North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656, decided the same day as Benton, the Court unanimously accorded fully "retroactive" effect to the Benton doctrine.

Further, three circuits have considered the issue and have held Benton to be fully retroactive. See *Mulreed v. Kropp*, 425 F.2d 1095 (C.A. 6, 1970); *Booker v. Phillips*, 428 F.2d 420 (C.A. 4, 1970); and *Galloway v. Beto*, 421 F.2d 284 (C.A. 5, 1970). In the *Mulreed Case, supra*, the Sixth Circuit reasoned the issue of retroactivity as follows:

> We think this case (*Benton*) goes beyond the concededly important consideration of the integrity of the truth determining process; it goes to the very quick of a very long and cherished heritage in the administration of criminal justice, namely the sometimes extended deprivation of liberty as the price for demanding successfully a trial process free of constitutional infirmity. Therefore we conclude that *Benton* applies retroactively and is controlling here.

Although the retroactivity of the *Benton* decision is not necessarily determinative of the issue presented in the present case, that is, whether *Waller v. Florida* should be

accorded retroactive effect, it is obvious that the reasoning which accords retroactivity to *Benton* must be given weighty consideration in determining the retroactivity of *Waller v. Florida.*

A second observation appropriate at this point is that *Waller v. Florida* overrules no previous federal judicial precedent. Rather, it relies upon a reassertion of the principles laid down in the 1907 decision of *Grafton v. United States,* 206 U.S. 333, 51 L. Ed. 1084, 27 S. Ct. 749. Accordingly, the *Waller* decision establishes no new federal constitutional interpretation except to the extent that it may overrule some local or state court decision to the contrary.

When the foregoing two observations are jointly considered, they appear to be tantamount to a prior adjudication upon the issue now before the Court and to require that *Waller v. Florida* be given fully retroactive effect. To the extent that the *Waller* decision asserts the double jeopardy rule of *Benton v. Maryland,* the issue of retroactivity has been adjudicated. To the extent that the *Waller* decision asserts the rule of *Grafton v. United States* to deny any dual sovereignty between a state and its municipalities, no new federal constitutional law is established and no former federal precedent is overruled.

It is important to note that the Fifth Amendment rights recognized in *Waller* is not concerned with merely an evidentiary privilege. *Waller* constituted a recognition that municipal and state courts cannot try a defendant twice on charges based on the same facts. This case places an effective limitation upon the government itself. It is a recognition that the methodology utilized in the State of Tennessee is not consonant with the rights guaranteed by the Fifth Amendment. It follows inevitably that many of

those convicted in this state were convicted in derogation of their Fifth Amendment rights. Denial of these rights in the past went to the heart of the prosecution. Recognition of these rights constitutes a complete and effective bar to the governmental proceedings directed towards punishment of the exercise of the Fifth Amendment rights. Recognition of the retroactivity of *Waller* will permit at least a partial purging from our history and our jurisprudence of convictions obtained by a process repugnant to our Constitution.

A consideration of the two remaining criteria for determining the issue of retroactivity, that is, the reliance placed by law enforcement officials upon a contrary rule and the effect on the administration of justice of a retroactive application, would appear to be precluded under the foregoing discussion of Supreme Court decisions, for their analysis is appropriate only where retroactivity remains in question after a consideration of the initial criteria.

II.

THE RELIANCE PLACED ON THE OLD RULE BY LAW ENFORCEMENT OFFICIALS.

It may be noted in this regard that Chief Justice Burger in a footnote to his opinion in the *Waller Case* (see footnote # 3) lists 21 states which currently treat municipalities and the state as separate sovereigns for double jeopardy purposes. Obviously the State of Florida may be added to this list; so, too, may the State of Tennessee. See *Mullins v. State*, 214 Tenn. 366, 380 S.W.2d 201 (1964); *Greenwood v. State*, 65 Tenn. 557 (1873). While in a very real sense these state decisions are overruled by the *Waller Case*, the states cannot be said in any sense to

have relied upon a federal precedent in establishing their rule, as the federal precedent of *Grafton v. United States, supra,* was to the contrary, as pointed out in the *Waller* decision.

In *Grafton v. United States, supra,* the defendant, a Private in the Army of the United States, was tried and acquitted by a military court-martial of the offense of second degree murder while on duty in the Philippine Islands. Following his acquittal, the accused was indicted for murder under the Philippine Penal Code for the same offense. The defendant was found guilty after his plea of double jeopardy had been overruled.

The Supreme Court reversed the conviction and Justice Harlan delivered the opinion:

> It must, then, be taken on the present record that an affirmance of the judgment of the civil court will subject the accused to punishment for the same acts, constituting the same offense as that of which he had been previously acquitted by a military court having complete jurisdiction to try and punish him for such offense. It is attempted to meet this view by the suggestion that Grafton committed two distinct offenses—one against military law and discipline, the other against the civil law which may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed—and that a trial for either offense, whatever its result, whether acquittal or conviction, and even if the first trial was in a court of competent jurisdiction, is no bar to a trial in another court of the same government for the other offense. We cannot assent to this view. It is, we think, inconsistent with the principle, already announced, that a general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or

soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public. The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States cannot withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102A Article of War (which is the same as Article 87, adopted in 1806, 2 Stat. 369) declares that "no person"—referring, we take it, to persons in the Army—"shall be tried a second time for the same offense." But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government.

Therefore, the United States Supreme Court, as early as 1907, laid down the principle involved in the case at bar and *Waller* concerning "dual sovereignty." Yet, the City Court of Chattanooga, Tennessee, has flagrantly ignored this ruling because of its practice of raising revenue by fining defendants on violations of City Ordinances which are in fact either identical or lesser included offenses of state charges.

It is the position of the petitioner that such action constitutes such a deliberate violation of his rights under the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment that the interests of justice demand a retroactive application of *Waller*.

The petitioner also contends that the State's reliance on *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149 (1937), is misplaced as an attempt to establish a precedent to justify the denial of a retroactive holding in *Waller*.

It first must be established that the issues involved in *Waller* are completely distinguishable from *Palko*.

In *Palko*, the defendant was convicted of second degree murder and sentenced to life imprisonment. On appeal, the conviction was overturned and the defendant granted a new trial. A plea of double jeopardy was overruled and the defendant was convicted of first degree murder. The Court affirmed the conviction and Justice Cardozo rendered the opinion:

> Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political

institutions"? Hebert v. Louisiana, supra. The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. State v. Felch, 92 Vt. 477, 105 A. 23; State v. Lee, supra. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge (State v. Carabetta, 106 Conn. 114, 137 A. 394), has not been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

Under recent holdings of the Supreme Court, the conviction of Palko on a first degree murder charge after being originally convicted of second degree murder would have to be set aside, but that is not the issue involved in the present case.

It is the petitioner's contention that the conduct of the City of Chattanooga, Tennessee, in violating his Fifth Amendment rights for the purpose of raising revenue does "violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," discussed by Justice Cardozo.

III.

THE EFFECT ON THE ADMINISTRATION OF JUSTICE.

The respondent has submitted certain data regarding the impact on the administration of justice, consisting of responses received from law enforcement authorities in the various jurisdictions previously following the dual sovereignty rule. It may be noted that the responding officials from ten states previously following the dual sovereignty rule expressed the opinion that the *Waller* decision would have little or no effect on the administration of justice in their state (Alabama (App. p. 28), Illinois (App. p. 30), Idaho (App. p. 35), Mississippi (App. p. 39), Missouri (App. p. 41), Nevada (App. p. 44), Nebraska (App. p. 43), Oregon (App. p. 54), Wisconsin (App. p. 63), and Wyoming (App. p. 68). Four expressed the opinion that sufficient data was not available to make an evaluation (Colorado (App. p. 32), Minnesota (App. p. 00), North Dakota (App. p. 50), and Oklahoma (App. p. 52). And no response was received from seven states (Alaska, Iowa, Kansas, Louisiana, Ohio, South Dakota, and Florida). Only the responses from two states (Tennessee (App. p. 21) and Washington (App. p. 61)) expressed the opinion that there would be a substantial effect on the administration of justice by a retroactive application of the *Waller* decision. Except upon the local level within this jurisdiction, the data submitted does not appear to satisfactorily establish a preference against retroactivity.

The petitioner feels that an in-depth analysis of the responses should be discussed in order to determine whether a retroactive holding of *Waller* in the case at bar would be significant.

In *Tehan v. United States*, 86 S. Ct. 459, 382 U.S. 406 (1966), Mr. Justice Stewart discussed "the effect on the administration of justice of a retrospective application of *Mapp v. Ohio*.

The last important factor considered by the Court in Linkletter was "the effect on the administration of justice of a retrospective application of Mapp." 381 U.S., at 636, 85 S. Ct. at 1741. A retrospective application of Griffin v. California would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of Mapp. A retrospective application of Mapp would have had an impact only in those States which had not themselves adopted the exclusionary rule, apparently some 24 in number. A retrospective application of Griffin would have an impact only upon those States which have not themselves adopted the no-comment rule, apparently six in number. But upon those six States the impact would be very grave indeed. It is not in every criminal trial that tangible evidence of a kind that might raise Mapp issues is offered. But it may fairly be assumed that there has been comment in every single trial in the courts of California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio, in which the defendant did not take the witness stand—in accordance with state law and with the United States Constitution as explicitly interpreted by this Court for 57 years.

Empirical statistics are not available, but experience suggests that California is not indulging in hyperbole when in its *amicus curiae* brief in this case it tells us that "Prior to this Court's decision in Griffin, literally thousands of cases were tried in California in which comment was made upon the failure of the accused to take the stand. Those

reaping the greatest benefit from a rule compelling retroactive application of Griffin would be [those] under lengthy sentences imposed many years before Griffin. Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available." There is nothing to suggest that what would be true in California would not also be true in Connecticut, Iowa, New Jersey, New Mexico, and Ohio. To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.

In *Williams v. United States, supra,* Mr. Justice Brennan, in a concurring opinion overruling retroactive application of *Chimel v. California,* 89 S. Ct. 2034, 395 U.S. 752, stated:

Persons convicted through the use of evidence inadmissible under *Chimel* have been found to have engaged in conduct which the government involved may legitimately punish. *Chimel* casts no doubt upon the propriety of the government's interest in punishing those who have enaged in such conduct. Accordingly, it may fairly be assumed that retroactive application of its standards would result in a substantial number of retrials. Yet *Chimel* likewise casts no doubt upon the reliability of the initial determination of guilt at the previous trial. Moreover, the legitimate reliance of law-enforcement officials on *Harris* and *Rabinowitz,* as already noted, may well have led them to conduct a warrantless search merely because the warrant requirement, although easily satisfied, was understandably not understood. The consequence of this is that retroactive application of the standards applied in *Chimel*

would impose a substantial burden upon the federal and state judicial systems, while serving neither to redress knowing violations of individual privacy nor to protect a class of persons the government has no legitimate interest in punishing.

In *Linkletter v. Walker, supra,* Mr. Justice Clark stated:

> Finally there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

The responses from the two states, Tennessee and Washington, which feel that a retroactive holding of *Waller* would have an adverse effect on the administration of justice must be closely analyzed.

In the affidavit of Phil M. Canale, Jr., District Attorney General of Shelby County, Tennessee (App. p. 22) and his letter to Edward E. Davis, District Attorney General of Hamilton County, Tennessee (App. p. 24), there are some rather revealing statements:

> We have found that there would be a minimal effect on felonies which were pending both prior to *Waller v. Florida* and presently pending if *Waller v. Florida* were declared to be retroactive. This minimal effect is due to the established way in which the bind-over hearings were held in the City Court in this jurisdiction . . . .

> However, with respect to misdemeanors that are presently pending, we feel that approximately 15% of the present misdemeanors in Shelby County would have to be dismissed if *Waller v. Florida* was declared to be retroactive .... (October 30, 1970. (App. p. 22)

The letter of November 17, 1970, from District Attorney Canale is certainly vague and based on speculation. Out of 840 records of inmates requested to be checked for possible *Waller* effect, only 42 were actually checked. Of these only two (2) could have been adversely affected by a retroactive holding of *Waller*. His guess of forty (40) serious felonies affected by a retroactive holding is certainly only an approximation and is not absolutely accurate. The following statement is also significant:

> We have been fortunate in this jurisdiction in the manner in which these cases have been handled in City Court as far as the lack of placing city charges on these serious felony charges. (App. p. 25)

The affidavit of Edward E. Davis, District Attorney General from Hamilton County, Tennessee, fails to distinguish between felonies and misdemeanors (App. p. 26). Since his affidavit was dated November 30, 1970, this is a highly important factor in determining the effect on the administration of justice.

Tennessee Code Annotated §39-105 states the prescribed penalty for misdemeanors in our state:

> Every person who is convicted of a misdemeanor, the punishment for which is not otherwise prescribed by a statute of this state, shall be punished by imprisonment in the county jail or workhouse not more than one (1) year, or by fine not exceeding one thousand dollars ($1,000.00), or by both, in the discretion of the court.

Therefore, any defendant being held on a misdemeanor charge in Tennessee would most likely have already been released from custody and therefore not affected by a retroactive holding.

Also significant is the fact that Tennessee is a state which has an Indeterminate Sentence Law which allows a prisoner to be eligible for parole at an earlier date than the number of years imposed by the court of jury.

The applicable statutes concerning sentencing are:

40-3612. Eligibility for parole.—Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board. The time of his release shall be discretionary with the board, but no such person shall be released until he has served such minimum sentence nor until he shall have served one (1) year.

Every person sentenced to a determinate sentence and confined in a state prison, when he has served a period of time equal to one-half (1/2) of the sentence imposed by the court for the crime for which he was convicted, but in no event less than one (1) year, shall likewise be subject to parole in the same manner provided for those sentenced to an indeterminate sentence.

The action of the board in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law.

In addition thereto where eligibility for parole or discharge after all good conduct credits have been given, shall occur more than eighteen (18) months but not more than five (5) years from the date of

sentence, the board at its discretion may grant a probationary parole to such prisoner not more than six (6) months before the date of his eligibility for parole or discharge, and where such date of eligibility for parole or discharge shall occur more than five (5) years from the date of sentence, it may grant such probationary parole not more than one (1) year from the date of elibigility.

40-3613. Power to parole.—The board of probation and paroles shall have power to cause to be released on parole any person sentenced to confinement in the penitentiary who has served the minimum term provided by law for the offense committed by him, less good time; provided, that no convict serving a life sentence shall be paroled until he has served for twenty-five (25) years, less diminution which would have been allowed for good conduct had his sentence been for twenty-five (25) years; provided further, that no person convicted of a sex crime shall be paroled unless the department of mental health, after an examination of such person, certifies to the board of probation and paroles that he could be released with safety to the public.

Any person having been convicted and sentenced as an habitual criminal under §40-2806, may become eligible for parole provided such person shall have been confined or served a term in the state penitentiary of not less than thirty (30) full calendar years. The granting of such parole shall be within the discretion of the parole board. Provided further, any person who shall have been convicted and sentenced to a term of imprisonment in the state penitentiary for a period or term of fifty (50) years or more, may become eligible for parole provided such person shall have been confined or

served a term in the state penitentiary of not less than thirty (30) full calendar years. The granting of such a parole shall be within the discretion of the parole board. The provisions of this paragraph shall apply to any inmate of the penitentiary heretofore convicted and coming within the provisions of this paragraph.

Under the provisions of Tennessee Code Annotated §41-1219, a prisoner serving time for a misdemeanor can receive a reduction of one-fourth (1/4) of his sentence on a misdemeanor charge for good behavior.

41-1219. Sentence to hard labor.—In all cases where a person is by law liable to be imprisoned in the county jail for punishment, or for failure to pay a fine and costs, or costs only, as the case may be, in misdemeanor cases, and in felony cases where the punishment has been commuted from confinement in the penitentiary to the county jail or workhouse, he shall be sentenced to be confined, and shall be confined, at hard labor in the county workhouse until the expiration of his sentence of imprisonment, and, thereafter, until the fine and costs, or costs only, as the case may be, have been worked out, paid, or secured to be paid. All such fines and costs shall be paid to the county trustee, upon receivable warrant of the judge or chairman of the court, when paid by the prisoner or his sureties.

Each such prisoner who shall have been sentenced to the county jail or workhouse for any period of time less than one (1) year on either a misdemeanor or a felony, and who shall demean himself uprightly, shall have deducted from the sentence imposed by the court time equal to one-quarter (1/4) of the said sentence. Fractions of a day's credit for good time of one-half (1/2) or more shall be considered as a full day's credit. Should any prisoner violate the

rules and regulations of the jail or workhouse, or otherwise demean himself improperly, the district attorney-general may file a petition with the clerk of the court which sentenced the prisoner and the trial judge shall set the cause for hearing within a reasonable time. Notice of such hearing shall be given to the prisoner and he shall be afforded the opportunity to be heard. After such hearing, the trial judge may revoke all or any part of the good time of such prisoner. The decision of the trial judge shall be final and no appeal may be taken from such decision. If the trial judge is not available for such hearing due to death, illness, recess, or any other cause, the hearing may be held by any other judge who has equal or concurrent jurisdiction with the trial judge. Provided, however, that the said one quarter (1/4) credit for good time shall not apply to prisoners after they have commenced to work out either fines or costs. Provided further, that upon passage this paragraph shall be retrospective in its application and shall apply to the entire sentence of those prisoners coming under the provisions of this paragraph who are confined to the county jail or workhouse on April 20, 1967.

Also, Tennessee criminal procedure allows a prisoner in the jail or workhouse on a misdemeanor conviction to petition the trial judge for a suspended sentence every thirty (30) days after the commencement of the execution of the judgment.

These statutes are cited by the petitioner to further show that it is very unlikely that there are prisoners in custody on misdemeanor charges who would be affected by a retroactive holding of *Waller*.

It is interesting to further note that Hamilton County appears to be the only jurisdiction that would be affected

in any way by a retroactive holding. No statistical data is presented by any of the other municipal courts in Tennessee's 95 counties alleging an adverse effect as a result of the petitioner's position being sustained.

As stated by the District Attorney from Memphis previously, very few felonies would be involved and it is highly doubtful that there are any prisoners now in custody on misdemeanor charges which were in effect in October, 1970.

Therefore, it is readily apparent that the City of Chattanooga, Tennessee, is the only jurisdiction that could possibly be adversely affected in this matter. The petitioner respectfully submits that the violation of his Fifth Amendment right against twice being placed in jeopardy far outweighs the interest of this single municipality to raise revenue. Until recently, it was also the practice in this state to require an individual to work out a fine and court costs. *Wilson v. Sloan*, 438 S.W.2d 75 (1968).

It would be an impossible task to determine just how many prisoners have had to remain in custody for a longer period of time than that imposed by the trial court in order to work out a fine and costs to raise revenue for the City of Chattanooga.

The inconsequential effect on the administration of justice caused by retroactivity of *Waller* is in sharp contrast to cases where retroactivity has been denied. In *Linkletter*, for example, the Court properly concluded that *Mapp's* retroactive application would have "tax[ed] the administration of justice to the utmost." *Linkletter v. Walker*, *supra* at 637. The *Mapp* rule, if retroactive, would have applied to evidence obtained by unreasonable search and seizure in any type of criminal case. Retrials

would have had to consider "the excludability of evidence long since destroyed, misplaced or deteriorated." *Linkletter v. Walker, supra* at 637. See also *Fuller v. Alaska, supra* at 81 (regarding evidence seized in violation of §605 of the Federal Communications Act, 47 U.S.C. §605). Also, retrials of cases long closed inevitably would be made exceedingly difficult because of "unavailability of witnesses and dim memories." *Stovall v. Denno, supra* at 300. These and similarly onerous burdens on the administration of justice were very persuasive in convincing the Court to deny retroactivity in *Stovall v. Denno, supra* at 300 (denying retroactivity to *Wade* and *Gilbert*), *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (denying retroactivity to *Escobedo* and *Miranda*) and *Tehan v. United States*, 382 U.S. 406, 418-19 (1966) (denying retroactivity to *Griffin v. California*).

The minimal effect of retroactively applying *Waller* is apparent from a comparison of its impact with the potential impact of the cases mentioned above. This minimal effect on the administration of justice is a persuasive reason in favor of applying *Waller* retroactively.

ARGUMENT

The Court of Appeals for the Sixth Circuit was in error in reversing the trial court's finding that the holding in *Waller v. Florida* be granted retroactive application in the case at bar.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below be reinstated and that the judgment of the Court of Appeals for the Sixth Circuit be vacated and the petitioner be discharged from custody.

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CERTIFICATE

We hereby certify that a copy of the foregoing Brief of Petitioner to the United States Supreme Court has been served by United States Mail, postpaid, this 28th day of June, 1972, upon David Pack, Attorney for Respondent.

Jerry H. Summers

James D. Robinson